INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1–2
Statement	2
Argument	5
Conclusion	10

CITATIONS

Cases:	
Berman v. *United States*, 302 U.S. 211	5
Brady v. *Maryland*, 373 U.S. 83	2, 6, 8
United States v. *Barash*, 365 F. 2d 395, certiorari denied, 396 U.S. 832	6
United States v. *Hooper*, 432 F. 2d 604	5
United States v. *Jones*, 425 F. 2d 1048, certiorari denied, 400 U.S. 823	8
Williamson v. *United States*, 332 F. 2d 123	8, 9
Statutes:	
15 U.S.C. 77q(a)	2
18 U.S.C. 1341	2
28 U.S.C. 2106	4, 5, 6

451-844—71

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-566

SAM FORD FISHBEIN AND LEONARD YORDON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 15-28) is reported at 446 F. 2d 1201.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1971. A petition for rehearing was denied on September 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the decision of the court of appeals in affirming a judgment of conviction with respect to two counts but vacating the judgment of conviction with

respect to thirteen other counts on the condition that the judgment could, in the discretion of the district judge, be reinstated in the event of a probation violation, was improper and whether this is an appropriate stage at which to determine that question.

2. Whether the government withheld exculpatory information in violation of *Brady* v. *Maryland*, 373 U.S. 83.

3. Whether the trial court erred in not giving an instruction *sua sponte* on the weight to be accorded the testimony of an accomplice.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioner Fishbein was convicted of conspiracy (Count 1), thirteen counts charging fraud in the sale of securities in violation of 15 U.S.C. 77q(a) (Counts 2–8, 10–15), and one count charging the use of the mails to defraud in violation of 18 U.S.C. 1341 (Count 21). Petitioner Yordon was convicted of conspiracy and three counts charging fraud in the sale of securities in violation of 15 U.S.C. 77q(a) (Counts 2, 4, 8). Fishbein was fined $5,000 on the conspiracy count; the imposition of sentence for the substantive offenses was suspended and he was placed on probation for two years on the remaining fourteen counts. Yordon was fined $1,000 on the conspiracy count and placed on probation for two years on the three substantive counts on which he was convicted. On appeal Fishbein's convictions on counts 1 and 3 were affirmed; the judgment of conviction as to the remaining counts was vacated, with the provi-

sion that it could be reinstated, in the discretion of the district judge, if Fishbein violated the terms of his probation as to count 3. With respect to Yordon, the judgment was affirmed as to the conspiracy count and reversed as to the other three counts (Pet. App. 15–28).

The evidence, which is not in dispute, is set forth in the opinion of the court of appeals (Pet. App. 15–19, 24–26). Briefly it showed that in June 1961, a group, consisting of Fishbein and four others, acquired an interest in six motels, two of which were located in Phoenix, Arizona, and one each in the cities of Tucson, Tulsa, Houston, and San Diego. They organized a corporation, HiwayHouse Hotels, Inc., and transferred the motels to the corporation in exchange for 150,000 shares of common stock with a par value of $1 per share. The corporation then offered 225,000 shares of common stock to the public at a price of $4.80 per share. Fishbein became vice-president of HiwayHouse in November 1961, and its president in January 1962. Yordon, Fishbein's brother-in-law, was hired as a minor executive and salesman to assist in selling the corporate stock.

In promoting the sales of its stock, HiwayHouse issued a prospectus dated October 3, 1961, containing a balance sheet dated August 1, 1961. The prospectus stated that the officers of the corporation served without "remuneration as such." Additional prospectuses were issued on November 28, 1961, and October 11, 1962, each containing the balance sheet dated August 1, 1961. The evidence at trial indicated that the

prospectuses contained false and misleading information in that they failed to reflect diversion of corporate funds by officers to their personal use, and diversion of corporate assets to other corporations whose stock was owned by HiwayHouse officers. As the court of appeals found, the evidence warranted an inference by the jury that "the various defendants did not want their dealings with the corporate funds and credit made public and tacitly agreed upon the content and use of the prospectuses which failed to reflect those dealings" (Pet. 18).

The evidence relating to Fishbein's substantive offense (count 3) showed that he made false and misleading statements to a customer who had received the November 1961 prospectus by mail and purchased 1300 shares of stock for $6,140.00. In making stock sales, Yordon used the various prospectuses, which he knew to be false, and was aware of the fact that the mail was used to obtain inquiries by prospective purchasers and to maintain a continuing relationship with the purchasers.

In vacating the judgment of conviction with respect to thirteen of Fishbein's substantive counts, while providing that the judgment on such counts could be reinstated if Fishbein violated the terms of his probation under the single substantive count affirmed on appeal, the court below relied on its general powers under 28 U.S.C. 2106.[1] In the event of reinstatement,

[1] "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it

the convictions under the thirteen counts would then be subject to appellate review (Pet. App. 19–20). The court of appeals noted that this disposition did not vacate the jury verdicts but, in effect, suspended the imposition of sentences. See *United States* v. *Hooper*, 432 F. 2d 604, 606 (C.A. D.C.). The court found that this mode of disposition did not harm the defendant and deprived the government only of an additional record of conviction; it stated: "Under these circumstances we believe that the interests of justice are better served if this Court turns its attention to the many real and pressing problems before it which cry for an early solution, rather than to engage in the vast labor necessary to solve on this appeal what now appear to be almost academic problems" (Pet. 20–21).

ARGUMENT

1.a. Petitioner Fishbein urges that the vacating of the judgment with respect to the thirteen counts ignores the possibility of adverse collateral consequences arising from unresolved convictions and is not authorized by 28 U.S.C. 2106. Since the convictions were conditionally vacated, there are no collateral consequences that can affect Fishbein as long as he does not violate the terms of his probation (*Berman* v. *United States*, 302 U.S. 211, 212–213); in that event, as the court below noted, the convictions will be subject to appellate scrutiny. Moreover, while we believe

---

for review, and may remand the cause and *direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.*" (Emphasis supplied.)

the court of appeals' action in allowing for possible reinstatement at a later date was permissible under 28 U.S.C. 2106, it will be time enough to resolve that question when and if such reinstatement takes place.

b. Petitioners argue that the jury's verdicts on the counts which were affirmed were prejudiced by the possible error in the convictions which were vacated on appeal. The situation here, however, is not like that in *United States* v. *Barash*, 365 F. 2d 395, 403 (C.A. 2), certiorari denied, 396 U.S. 832, relied on by petitioners, where the Second Circuit, in finding error with respect to convictions on twenty-four of twenty-six bribery counts, held that it was far from certain that the error found did not have a "spill-over" effect on the remaining tw counts, and therefore deemed it necessary to reve e the convictions on the other two counts. Here no comparable "spill-over" was present. The court below properly found the evidence sufficient to sustain the conviction of both petitioners on the conspiracy count; the convictions on each of the substantive counts rested on independent evidence involving different investors and thus evidence introduced with respect to one count would not be likely to have a "spill-over" effect on the other counts. Indeed, the jury's ability to apply the evidence discriminately count by count is reflected by the fact that petitioners were acquitted on some of the substantive counts.

2. Petitioners contend that the government withheld exculpatory material in violation of *Brady* v. *Maryland*, 373 U.S. 83, by not making available prior to

trial questionnaires, prepared by the Securities and Exchange Commission, in the possession of the government. These questionnaires were sent to HiwayHouse investors and contained statements by investors regarding representations made to them by HiwayHouse representatives in the course of promoting the sales of HiwayHouse stock. Prior to its decision, the court below remanded the case to the district court for the purpose of conducting a hearing to determine whether the government's failure to make timely disclosure of the information in question necessitated the granting of a new trial. The district court conducted a hearing in June 1970 and denied a new trial on July 21, 1970.

The district judge found that all questionnaires relating to the conduct of the defendants named in the indictment were produced by the government prior to trial. In addition, defense counsel were advised of the existence of questionnaires unrelated to any of the defendants. During the trial, the government was ordered by the court to produce all questionnaires whether or not they related to any defendant named in the indictment. Following government compliance with the court's order, petitioners had three days within which to examine the additional questionnaires. No objection with respect to the questionnaires was made at trial and defense counsel employed the questionnaires in the cross-examination of six investor witnesses. It is thus clear, as the district judge concluded, that the materials relevant to the named defendants were presented to defense counsel "substantially prior to the time limit announced" in

Brady. Moreover, since the questionnaires indicated that investors had not been informed of certain financial and property losses incurred by the corporation, the trial judge correctly found that the questionnaires were incriminatory rather than exculpatory in nature.

3. Petitioners, relying on *Williamson* v. *United States*, 332 F. 2d 123 (C.A. 5), argue that the trial judge should have given an instruction that the testimony of an accomplice should be viewed with caution, even though no such instruction was requested, or, if it was requested, was apparently withdrawn. The court of appeals, however, properly determined (Pet. App. 23), that, in the absence of a request, failure of the trial court *sua sponte* to give an accomplice instruction was not plain error. See *United States* v. *Jones*, 425 F. 2d 1048, 1055–1056 (C.A. 9) and cases there cited, certiorari denied, 400 U.S. 823. In denying a petition for rehearing,[2] the court noted that proposed defense instruction No. 12[3] (see Pet. 12–13) did not

[2] The order denying rehearing was sent to this Court separately and is not included in the petition.

[3] Requested instruction No. 12 read as follows: "It is neither criminal nor unlawful to do or conspire to do that which the law does not prohibit but recognizes may be lawfully done without prejudice or injury to the United States or the state. Thus, when the government relies upon circumstances to prove a conspiracy or the devising of a scheme or artifice to defraud, the case comes within that class of cases where an intent different from the ordinary criminal intent must be

deal with the testimony of an accomplice, but that proposed instruction No. 5 (set forth at Pet. App. 29, but erroneously labeled as proposed instruction No. 12), which dealt with an accomplice's testimony, had apparently been withdrawn.

Although in exceptional circumstances, failure to give an accomplice instruction has been deemed plain error (see *Williamson, supra*), no such circumstances existed here. Unlike *Williamson* where the government's case was made entirely by the accomplice, whose testimony contained many inconsistencies, the government's case here was not founded solely or even largely on the testimony of petitioners' accomplices. To be sure, Sol Tropp and George Gottfried, originally indicted with petitioners, pleaded *nolo contendere* prior to trial and then testified at trial for the government. These men were, however, only two of more than fifty witnesses called by the government during the trial and their testimony constituted only a small portion of the government's evidence against petitioners. Under these circumstances, the refusal to give the instruction, if it was in fact requested and not withdrawn, was harmless error.

---

shown. There must be a showing of a corrupt intent, that is, the conscious and intentional purpose to break the law. *Fain* v. *United States*, 209 F. 525 (8th Cir. 1913); *Landen* v. *United States*, 299 F. 75, 78 (6th Cir. 1924); *Fall* v. *United States*, 209 F. 547, 553 (8th Cir. 1913)."

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Acting Assistant Attorney General.

ROGER A. PAULEY,
RICHARD A. LEVIE,
Attorneys.

DECEMBER 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971